

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERT THOMAS NORTHUP, ) CASE NO. C05-1358-JLR-MAT  
)  
Petitioner, )  
)  
v. ) REPORT AND RECOMMENDATION  
)  
SANDRA CARTER, )  
)  
Respondent. )  
\_\_\_\_\_ )

INTRODUCTION

Petitioner is a Washington state prisoner who pleaded guilty in 2000 to first degree kidnapping, second degree assault with a firearm, and first degree burglary. He has filed *apro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, contending chiefly that his former defense counsel later represented his accomplice in the crime, and petitioner's guilty plea is thereby tainted by counsel's conflict of interest. After considering the petition, respondent's answer, petitioner's response, and the balance of the record, the court recommends that the petition be denied with prejudice.

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01 BACKGROUND

02 The Washington Court of Appeals summarized the facts in petitioner's case as follows:

03 The State brought charges against appellant Robert Northup for a home  
04 invasion robbery in which he and two accomplices allegedly kidnapped a woman and  
05 shot her. Trial was set to begin March 16, 2000. Just before trial, police apprehended  
06 Michael Fernandez, one of the alleged accomplices. The State arraigned him on the  
07 same charges as Northup, and indicated to Northup's attorney, Debra Redford, that  
08 Fernandez would likely plead guilty and testify against Northup.

09 Redford had been assigned to represent Northup after the withdrawal of his  
10 former attorneys at the Kuvara law firm. Redford learned that Fernandez was being  
11 represented by Terri Stickney, who had worked for the Kuvara firm as a Rule 9 intern  
12 during the time the firm had represented Northup. She moved to disqualify Stickney  
13 based on a conflict of interest.

14 The court held a hearing on the motion to disqualify on March 20, 2000. At  
15 that point, pretrial proceedings had begun, but a jury had not yet been empanelled.  
16 Northup supported the motion with a declaration that Stickney had worked on his file  
17 while she was at the Kuvara firm and had substantive conversations with him about  
18 defense strategy, potential witnesses, and the contents of police reports. Stickney  
19 testified at the hearing and denied any substantive involvement in Northup's case. She  
20 acknowledged having answered his telephone calls to the firm and having, on one  
21 occasion, delivered papers to him at the jail. But she said she never spoke to him  
22 about the facts of his case, did not work on his case, did not look at his file, and did  
not know the details of his case. Based on Stickney's testimony, the State maintained  
there was no conflict of interest, and opposed the motion to disqualify.

Without resolving the factual dispute about the extent of Stickney's contact  
with Northup, the trial court did appoint substitute counsel to represent Fernandez  
with respect to his plea negotiations with the State and any testimony he might give  
in Northup's trial. The court ordered Stickney and her law partner not to discuss any  
details of Northup's case with substitute counsel. The court delayed the beginning of  
trial, in part so that the defense could investigate Northup's concerns that Stickney  
might have influenced the testimony Fernandez would give.

Within days, Fernandez pleaded guilty to charges arising from the home  
invasion incident. As part of the plea bargain he agreed to testify against Northup.  
Redford interviewed Fernandez the day after he entered his plea. What she learned  
during that interview is not reflected in the record. Northup then entered a guilty plea  
to first degree kidnapping, second degree assault with a firearm, and first degree  
burglary. The court imposed a standard range sentence of 267 months.

01 Five months later, Northup moved to set aside his guilty plea. Through new  
02 counsel, Mark Tackitt, Northup argued that his trial attorney, Redford, had been  
03 ineffective by failing to move to suppress Fernandez' testimony due to the conflict of  
interest. He also argued the prosecutor committed misconduct by bargaining for the  
testimony of Fernandez despite knowledge of the conflict of interest.

04 After reviewing the record of the disqualification hearing, the trial court  
05 denied the motion. The court noted that Northup had not introduced any facts  
06 substantiating his suspicion that Stickney had transmitted to Fernandez confidential  
information she had learned during her representation of Northup. Nor had he shown  
that the prosecutor took advantage of confidential information allegedly given to  
Fernandez. Northup appeals from this decision.

07  
08 *State of Washington v. Northup* , 120 Wash. App. 1019, 2004 WL 295159 (2004) (footnotes  
09 omitted); (Doc. #13, Ex. 4 at 2-4).

10 Petitioner appealed to the Washington Court of Appeals. The court affirmed petitioner's  
11 conviction in an unpublished opinion. *See State of Washington v. Northup*, 120 Wash. App. 1019,  
12 2004 WL 295159 (2004). Petitioner sought review by the Washington Supreme Court. The court  
13 denied review. *See State of Washington v. Northup*, 101 P.3d 108 (2004).

14 On August 4, 2005, petitioner submitted the instant petition for a writ of habeas corpus  
15 under 28 U.S.C. § 2254. (Doc. #1). After receiving an extension of time, respondent filed an  
16 answer, along with the state court record, on November 10, 2005. (Doc. #10). Petitioner filed  
17 a response to the answer on November 18, 2005 (Doc. #14), and the matter is now ready for  
18 review.

#### 19 GROUND FOR RELIEF

20 Petitioner sets forth the following grounds for relief in his habeas petition and the  
21 memorandum attached thereto:

- 22 1. A conflict of interest by petitioner's former counsel tainted the fairness of the

01 trial process in violation of the Sixth and Fourteenth Amendments.

02 2. Trial court's denial of motion to withdraw guilty plea violated the Fourteenth  
Amendment to the Constitution of the U.S.

03 3. Prosecutorial Misconduct.

04 4. Ineffective assistance of counsel during trial process.

05 5. Ineffective assistance of counsel during postconviction [sic] proceedings  
06 violated the Sixth Amendment to the Constitution of the United States, when  
07 postconviction [sic] counsel failed to obtain readily available affidavits  
favorable to the petitioner's claims.

08 (Doc. #1 at 6-11, Attachment at 17).

## 09 DISCUSSION

### 10 Standard of Review

11 Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may  
12 be granted with respect to any claim adjudicated on the merits in state court only if the state  
13 court's adjudication is *contrary to*, or involved an *unreasonable application* of, clearly established  
14 federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d) (emphasis added).

15 Under the "contrary to" clause, a federal habeas court may grant the writ only if the state  
16 court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law,  
17 or if the state court decides a case differently than the Supreme Court has on a set of materially  
18 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable  
19 application" clause, a federal habeas court may grant the writ only if the state court identifies the  
20 correct governing legal principle from the Supreme Court's decisions but unreasonably applies that  
21 principle to the facts of the prisoner's case. *Id.* In addition, a habeas corpus petition may be  
22 granted if the state court decision was based on an unreasonable determination of the facts in light

01 of the evidence presented. 28 U.S.C. § 2254(d)

02 In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court examined the meaning of  
03 the phrase “unreasonable application of law” and corrected an earlier interpretation by the Ninth  
04 Circuit which had equated the term with the phrase “clear error.” The Court explained:

05 These two standards, however, are not the same. The gloss of clear error fails  
06 to give proper deference to state courts by conflating error (even clear error) with  
07 unreasonableness. It is not enough that a federal habeas court, in its “independent  
08 review of the legal question” is left with a “firm conviction” that the state court was  
09 “erroneous.” . . . [A] federal habeas court may not issue the writ simply because that  
10 court concludes in its independent judgment that the relevant state-court decision  
11 applied clearly established federal law erroneously or incorrectly. Rather, that  
12 application must be objectively unreasonable.

13 538 U.S. at 68-69 (citations omitted). Thus, the Supreme Court has directed lower federal courts  
14 reviewing habeas petitions to be extremely deferential to decisions by state courts. See *Hall v.*  
15 *Director of Corrections*, 343 F.3d 976, 986 (9th Cir. 2003) (Tallman, J., dissenting). A state  
16 court’s decision may be overturned only if the application is “objectively unreasonable.” 538 U.S.  
17 at 69.

#### 18 Petitioner’s First, Third, and Fourth Grounds for Relief

19 Petitioner’s first, third, and fourth grounds for relief hinge upon the alleged conflict of  
20 interest between petitioner and his former defense counsel who subsequently represented Michael  
21 Fernandez, petitioner’s accomplice, in plea negotiations with the State. Petitioner contends that  
22 the conflict tainted the fairness of his trial (Ground One), led to prosecutorial misconduct (Ground  
Three) and that the failure by his then-counsel to move to suppress the testimony of Fernandez at  
trial constituted ineffective assistance (Ground Four).

These claims, however, do not appear to be reviewable by way of a petition for a writ of

01 habeas corpus. When a petitioner seeks to overturn a guilty plea through a habeas petition, review  
02 is narrowly prescribed: “As a general rule, one who voluntarily and intelligently pleads guilty to  
03 a criminal charge may not subsequently seek federal habeas corpus relief on the basis of pre-plea  
04 constitutional violations. *A defendant may only attack the voluntary and intelligent character of*  
05 *the guilty plea by showing that the advice he received from counsel was not within the range of*  
06 *competence demanded of attorneys in criminal cases.”* *Moran v. Godinez*, 40 F.3d 1567, 1577  
07 (9th Cir. 1994), *amended on denial of rehearing en banc*, 57 F.3d 690 (9th Cir. 1994) (internal  
08 quotation and citation omitted) (emphasis added).

09         Petitioner’s first and third claims do not challenge the advice given to him by his counsel  
10 at the time of his guilty plea. Rather, his first ground for relief focuses on the conflict of interest  
11 that petitioner contends undermined the fairness of his criminal proceedings, while his third ground  
12 asserts that the prosecutor took improper advantage of the conflict. Petitioner does not argue that  
13 counsel was unaware of the conflict of interest nor that she misinformed him about it. Indeed, the  
14 record shows that petitioner’s counsel was aware of the conflict and moved – successfully – to  
15 disqualify petitioner’s former counsel. (Doc. #13, Ex. 4 at 2-3; Ex. 22 at 38-39). Thus,  
16 petitioner’s first and third grounds for relief do not fall within the narrow class of claims a habeas  
17 petitioner may assert to overturn a guilty plea. Consequently, they should be dismissed.

18         Petitioner’s fourth ground for relief, that counsel was ineffective for failing to move to  
19 suppress Fernandez’s testimony, arguably constitutes a reviewable claim. Broadly construed, the  
20 claim may be viewed as arguing that counsel failed to give petitioner competent advice because  
21 she did not advise him that Fernandez could be barred from testifying against him. Had she done  
22 so, and had Fernandez’s testimony been barred, petitioner contends that he would not have chosen

01 to plead guilty. However, the record does not support a conclusion that counsel would have been  
02 successful had she sought to bar Fernandez from testifying. Petitioner raised this claim in his  
03 direct appeal, and the Washington Court of Appeals analyzed it as follows:

04       The issue presented by Northup's appeal is whether Redford should have  
05 sought the further remedy of suppression of Fernandez's testimony. Northup  
06 contends such a motion would have been granted without any necessity for him to  
show that Fernandez's testimony was actually influenced by Stickney's knowledge of  
confidential information about Northup.

07       Northup argues that Stickney committed an ethical violation; that it was the  
08 State's burden to prove that she did not disclose confidences to Fernandez, not his  
09 burden to prove the contrary; and therefore, Fernandez' testimony must be presumed  
10 to be "tainted." This argument is drawn from the disqualification cases and *Teja's*  
11 holding that, in the context of the rules of professional conduct, former clients need  
not prove that actual confidences were divulged in order to be entitled to  
disqualification. It does not necessarily follow that disclosure of the former client's  
confidences would be presumed in the context of a motion to suppress the testimony  
of the new client. . . .

12       Like the claims for relief in *Teja* and *Fountain*, Northup's claim of ineffective  
13 assistance depends on a showing of actual prejudice based on the record developed  
14 in the trial court. We can assume, based on an affidavit submitted by Northup in  
15 support of his personal restraint petition, that he would not have pled guilty if  
Fernandez's testimony had been suppressed. But this is peripheral to the main issue,  
which is whether the trial court likely would have granted a motion to suppress on the  
record developed in the trial court.

16       In this case, Northup has not identified any portion of the record indicating  
17 that any particular confidences or secrets of his were or could have been used to his  
18 disadvantage by Stickney in the course of her representation of Fernandez. He has  
19 not shown even by inference what the substance of Fernandez's allegedly tainted  
20 testimony against him might have been, if the case had gone to trial. On such an  
undeveloped record, with no showing of prejudice, and no citation to authority  
persuasively demonstrating that in such a context prejudice must be presumed, it  
cannot be said that a motion to suppress Fernandez's testimony would likely have  
been granted. Thus, Northup's claim of ineffective assistance fails under *McFarland*.

21 (Doc. #13, Ex. 4 at 8-12).

22       Thus, the Washington Court of Appeals rejected petitioner's argument that counsel could

01 have successfully barred Fernandez from testifying because petitioner failed to provide any  
02 evidence that Fernandez's testimony had been influenced by confidential information transmitted  
03 to him by petitioner's former counsel. This decision by the state court is not "objectively  
04 unreasonable," *Lockyer v. Andrade*, 538 U.S. 63, 69, and petitioner's fourth ground for relief  
05 should therefore be denied.<sup>1</sup>

06 Petitioner's Second and Fifth Grounds for Relief

07 In his second ground for relief, petitioner argues that the "[t]rial court's denial of [his]  
08 motion to withdraw guilty plea violated the Fourteenth Amendment . . . ." (Doc. #1 at 7). In his  
09 fifth ground for relief, petitioner argues that counsel was ineffective in representing petitioner on  
10 the motion to withdraw his guilty plea. Respondent argues that petitioner's second claim was not  
11 presented to the Washington Supreme Court as a federal issue and therefore is unexhausted.  
12 (Doc. #10 at 5). Alternatively, respondent argues that neither the second ground for relief nor the  
13 fifth can provide a basis for habeas relief because both grounds pertain to a post-conviction  
14 proceeding. (*Id.* at 16).

15 The court need not address respondent's exhaustion argument because, as respondent also  
16 argues, petitioner's second and fifth grounds for relief may not serve as grounds for habeas relief.

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18 <sup>1</sup> Petitioner attempts to overcome the weakness of the argument he made in state court by  
19 claiming to provide details that show how his former counsel improperly passed along confidential  
20 information, such as petitioner's proposed trial strategy, to Fernandez. (Doc. #1, Attachment at  
21 8). However, this attempt should be rejected for several reasons. First, it appears that such  
22 information was not presented to the state court and therefore this claim has not been fully  
exhausted. Second, petitioner's attempt to provide such details consists solely of his own  
assertions about what his former counsel learned from him and then told Fernandez. (Doc. #1,  
Attachment at 13-15). These assertions are not supported by affidavits or statements by the  
persons involved and therefore should not be given much, if any, weight.



01 Errors in the state post-conviction review process are not addressable through habeas corpus  
02 proceedings. *See Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989). Petitioner filed his motion  
03 to withdraw his guilty plea five months after he was sentenced. (Doc. #13, Ex. 4 at 3; Ex. 12 at  
04 3). Consequently, the trial court considered the motion under Superior Court Criminal Rule CrR  
05 7.8, entitled "Relief from Judgment or Order." The motion was thus considered as part of the  
06 state's "post-conviction review process," and accordingly, any alleged errors are not addressable  
07 through habeas corpus proceedings. *See Franzen*, 877 F.2d at 26. Petitioner's second and fifth  
08 grounds for relief should therefore denied.<sup>2</sup>

09 CONCLUSION

10 For the foregoing reasons, petitioner's petition for a writ of habeas corpus should be  
11 denied with prejudice. A proposed Order reflecting this recommendation is attached.

12 DATED this 5th day of January, 2006.

13   
14 Mary Alice Theiler  
15 United States Magistrate Judge  
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20 <sup>2</sup> Moreover, even if the claims were addressable through these proceedings, the claims  
21 would lack merit. The Washington Court of Appeals addressed these arguments in petitioner's  
22 direct appeal and rejected them. (Doc. #13, Ex. 4 at 4-14). The court of appeals' decision is  
based upon a review of the record and sound analysis and therefore is not "objectively  
unreasonable."